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Cable and Wireless
(Cayman Islands) Limited
P.O. Box 293
Grand Cayman KY1-1104
Cayman Islands

Telephone +1 (345) 949-7800
Fax +1 (345) 949 7962

LIME

Our ref: GR/CR/GR 15.19
27 January 2010

Mr. David Archbold,
Managing Director,
Information and Communication Technology Authority,
3rd Floor Alissta Towers,
P.O. Box 2502GT,
Grand Cayman. KY1-1104

Dear Mr. Archbold,

Re: FLLRIC Phase 3 Disclosure Request – Reconsideration Request

Cable and Wireless (Cayman Islands) Limited, trading as "LIME" ("**LIME**") requests that the Authority reconsider its 14 January 2010 determinations ordering the disclosure of LIME's confidential cost and traffic information in the forward-looking long-run incremental cost ("**FLLRIC**") models to the public and to LIME's competitors (the "**Determinations**").

The Determinations

In brief, the Authority determined that all of LIME's mobile-related confidential information in the FLLRIC models should be disclosed, with only a few exceptions (information in the "FAC Input" tab and LIME's prepaid and postpaid customer count). The Authority stated that the public interest in disclosure outweighed the harm to LIME, but gave no reasons or explanation. The Authority did note that "[a]ll real values in the 'FAC Input' sheet refer to actual LIME incurred costs and the number of subscribers to actual subscribers".

The Authority also determined that any redacted figures, known as "dummy data", must be clearly marked as such, and must fall within a range of plus or minus 50% of the actual figure.

Finally, the Authority determined that a number of the Appendixes and other documents filed by LIME on 15 October 2009 and 16 November 2009 should be disclosed in whole or in part.

The Regulations

Section 3(d) of the Information and Communications Technology Authority (Confidentiality) Regulations (the "Regulations") permits LIME to designate as confidential information which

"...could reasonably be expected -

- (i) to result in significant financial loss or gain to any person;
- (ii) to prejudice significantly the competitive position of any person; or
- (iii) to affect contractual or other liabilities of any person.

While section 5 of the Regulations permits the Authority to determine that the public interest in disclosure outweighs the harm to the person claiming confidentiality, the Authority must act reasonably and proportionally at all times.

Confidential Data in the Models

As the Authority would be aware, the 2G and 3G FLLRIC models contain more confidential information than the above would suggest. For example,

- the "Cost Assumptions" tab references the actual costs of some of LIME's network elements, related operating costs, and cell site lease payments (in ranges B100:B102, B113:B124, D158, D163, D167 and E173);
- the "Demand Calculations" tab references non-conversation holding times in cells C41:D41;
- the "Transmission Links" tab has actual costs of equipment in cells B42 and E42; and
- in addition to the confidential information cited by the Authority, the "Volume Input for TD" tab also includes LIME's mobile traffic minutes in highly disaggregated form (in columns X:AA).

There can be no argument that this information is confidential and competitively sensitive, and consistently treated as such by LIME, and LIME notes that the Authority did not suggest that the information noted above in the FLLRIC models was not confidential. There can also be no argument that disclosure of this information would give LIME's competitors a detailed picture of LIME's mobile traffic, and therefore a detailed understanding of LIME's competitive strengths and weaknesses, and enable them to prepare far more effective competitive offerings in the market, to their material financial and competitive gain and to LIME's material financial and competitive loss, per section 3(d).

However, when it came time to explain why the Authority was exercising its power under section 5 of the Regulations, the Determinations are surprisingly lacking. In the particular case of the three FLLRIC cost modules, while the Authority provided some explanation as to why it was ordering disclosure of some of the information contained in the Appendices and related documents, and explained why it was permitting protection of the FAC Input tab information and of the prepaid and postpaid customer numbers, at no time did it explain why it was ordering disclosure of the other information in the FLLRIC models (which it implicitly agreed was confidential).

Fundamental Error

LIME submits that the Authority committed a fundamental error in arriving at the Determinations, as they are irrational and not proportionate. Simply put, the harm to LIME is patently obvious and so clearly outweighs the public interest in disclosure that a reasonable person would not have come to the same determinations.

Release of the cell site lease payment information to the public, for example, would materially disturb LIME's relationships with its landlords and would prejudice LIME in its current and future lease negotiations, as all landlords would seek to push their charges to highest level they will see in the model. This will make it more difficult for LIME, and indeed for all telecommunications operators in the country, to obtain reasonably-priced leases for telecommunications equipment sites. Note also that the leases are contracts between LIME and its lessors, and the effect of the Determinations would be to disclose to the public the contents of a private contract. It is on the basis that this information was designated confidential by LIME. Its disclosure would "prejudice significantly the competitive position of any person" pursuant to Section 3d(ii) of the Regulations and "affect contractual or other liabilities of any person" pursuant to Section 3d(iii). It is inconceivable that the Authority believes this would be in the public interest.

Some of the confidential information, that would be disclosed under the Determinations, provides LIME's actual costs of equipment, for example in the "Cost Assumptions" tab and in the "Transmission Links" tab. This information would give competitors information on LIME's actual cost base, which would enable them to prepare more effective competitive responses and, pursuant to section 3d (iii) of the Regulations, significantly prejudice LIME's competitive position. Elsewhere, the Authority has protected LIME's actual costs, yet in the Determinations relating to the 2G and 3G modules, apparently determined not to, even though it too represented actual costs. In fact, the Authority explicitly agreed that the harm from disclosure of the information in Appendix A would outweigh the public interest in its disclosure, yet ordered LIME to disclose the very same information from Appendix A where it was reproduced in the 2G and 3G modules (cells D158 and D163 of the "Cost Assumptions" tab). LIME submits that this inconsistency is so unreasonable and irrational as to amount to an error of law,

The traffic information in the "Volume Input for TD" tab and the non-conversation holding time in the "Demand Calculations" tab are also competitively sensitive. This information is not available anywhere else and, if disclosed, would give competitors detailed information about LIME's traffic patterns and customer base. LIME notes that, even after two public consultations on the subject, the Authority has still not determined to publish the mobile traffic figures of the industry in the aggregate. If the Authority is not convinced that the public interest in the publication of highly aggregated national traffic information outweighs the harm to all operators from that disclosure, it is not reasonable for the Authority to conclude that the public interest in the publication of one operator's traffic information, disaggregated in detail by wholesale and retail service, would outweigh the clear harm to that one operator. Therefore this information should continue to be designated confidential pursuant to Sections 3(d) (i) and (ii) of the Regulations.

LIME submits that these results are so unreasonable and irrational that a regulator could not have arrived at them, had it properly turned its mind to the subject. LIME requests that the Authority now do so, and reconsider its Determinations to require almost-blanket disclosure of LIME's confidential information in the 2G and 3G modules.

Lack of Proportionality

LIME submits that the unreasonableness of the Authority's Determinations is compounded by the lack of proportionality. The Authority ought to be aware that full disclosure of confidential figures is not necessary to enable the public to assess the FLLRIC models. This is all the more the case when the Authority set out in the very same Determinations an alternative to full disclosure of real data. The Authority's "Conditions for Masking Real Data" (the "**Conditions**") strike a balance between disclosing enough information to allow the public to review the FLLRIC models and protecting LIME from the prejudice that would be caused through the disclosure of its confidential information.

LIME submits that if the Authority is in fact convinced that the "dummy data" in the 16 November 2009 versions of the FLLRIC models is not sufficient to permit a full assessment of the models, the Authority could have simply required LIME to apply the Conditions to the dummy data, instead of ordering the release of the actual, confidential data, with the harm to LIME that this would occasion. This would result in a set of numbers within a reasonable range of the actual numbers (something the Authority implicitly acknowledged by requiring the Conditions in the first place) without revealing to the public the actual numbers and causing LIME the harm identified above. LIME submits that such an approach applied to the information in the FLLRIC modules identified above would far better serve the public interest and balance the public and private interests in this case, than the Determinations.

Requirement to Give Reasons

LIME also submits that the Authority has erred in law by its failure to give reasons for ordering the disclosure of some of the information in the FLRIC Model. The Authority's approach is also repeated in respect of the responses to interrogatories and related appendices, where the explanation provided by the Authority is the repetition of the wording of Section 5(i) of the Regulations or variations thereof: "[t]he Authority is not satisfied that the specific direct harm likely to result from the disclosure outweighs the public interest in disclosure and therefore determines that LIME's confidentiality claims are not justified." Common law case law accepts a requirement to give reasons as an essential element of administrative justice and fairness. Unless an aggrieved person can discover the reasoning behind the decision of a public authority, he or she may be unable to tell whether it is reviewable or not, and may be deprived of the protection of the law. In this case, where LIME has labeled parts of the information as confidential, and a competitor is seeking that the information be disclosed – and much of the information is commercially sensitive information – the Authority must give the reasons behind accepting, and indeed rejecting, the application for disclosure. Therefore the repetition of the wording of Section 5(i) of the Regulations does not suffice. In fact the cases have addressed similar approaches to giving reasons, and recognized that in some cases formal or exiguous reasons may be held to be adequate. However, where such a formula was used as a "ritual incantation" the courts would intervene¹ – even more so for instances such as the present where a detailed set of reasons is required in each instance, and the formulaic approach does not suffice.

Digicel's Private Interest

In all of this, LIME is cognizant that the one other active party in the FLLRIC proceedings is a competitor, Digicel Cayman Limited. Digicel clearly has a private interest in gaining access to LIME's confidential information, including LIME's detailed traffic information, network and operating cost information, and cell site

¹ See *Bone v. Mental Health Review Tribunal* [1985] 3 All ER 330.

lease information, as this would be a valuable resource in a highly competitive market that would enable them to better compete against LIME. However, this is not in fact the “public interest”, and it is unreasonable for the Authority to advance the private interest of one operator against another operator under the guise of advancing the public interest.

Confidential Information in the Appendices

The Determinations include a requirement to disclose partially redacted versions of the Appendices V and VIII filed with the Authority on 16 November 2009.

In the case of Appendix V, the Authority permitted redaction of the “exp_alloc” and “Revenue Mapping” tabs, noting that in so doing the revenue information in the “drivers” tab would also be redacted. However, the Authority ordered publication of the remaining information in the Appendix V.

In so doing, the Authority acted unreasonably and irrationally, by failing to take into account all of the information contained in the “drivers” tab. In addition to the revenue information derived from the “Revenue Mapping” tab mentioned by the Authority, it also includes fixed and mobile network call volume information and mobile subscriber information identical to the equivalent information in the FLLRIC modules. Without prejudice to LIME’s position that the harm to LIME that would be caused by disclosure of this information outweighs the public interest in its disclosure, LIME notes that the requirement to disclose it is wholly inconsistent with other statements in the Determinations permitting LIME to file it in confidence, in particular the fixed network call volume and the mobile subscriber information. LIME submits that this is so unreasonable and irrational as to amount to an error of law, and requests that the Authority reconsider its Determinations to permit LIME to redact the information consistent with the other Determinations. With respect to the mobile call volumes, LIME requests that the Authority reconsider its Determinations and permit LIME to redact it, consistent with LIME’s request above regarding the confidential information in the FLLRIC modules themselves.

In the case of Appendix VIII, while the tab to be disclosed, “Mobile RFs”, includes “reasoning and explanation for how they [the routing factors] were derived”, it also includes a detailed block diagram of LIME’s GSM network in the Cayman Islands.

Without prejudice to any other arguments made in this application, LIME submits that this level of detail is technical information that is consistently treated as confidential by LIME and is not available from any other source. Further, it is of limited importance for determining the cost of mobile termination, and its disclosure to the public exposes the LIME network to unnecessary security risks, as it would provide a detailed understanding of the structure of the LIME network that could be used to harm that network. It should therefore be treated as confidential under Sections 3(d) (i) and (ii) of the Regulation. LIME requests, therefore, that it not be required to place that block diagram on the public record.

Conclusion

LIME requests that the Authority reconsider its 14 January 2010 Determinations requiring disclosure of LIME’s confidential information to its competitors and to the public. In particular, LIME requests that LIME be permitted to:

- redact LIME's confidential actual information in the 2G and 3G FLLRIC modules, subject to the Conditions;
- in the alternative to the foregoing, redact LIME's confidential actual volume information in the "Volume Input for TD" tab of the 2G and 3G FLLRIC modules, as well as LIME's confidential actual cell cite lease payments and actual regional platform costs in the "Cost assumptions" tab of the 2G and 3G FLLRIC modules, all subject to the Conditions;
- redact LIME's confidential actual fixed and mobile network call volume and mobile subscriber information in the "drivers" tab of the 16 November 2009 version of Appendix V, subject to the Conditions; and
- redact the detailed block diagram of LIME's GSM network in the Cayman Islands in 16 November 2009 version of Appendix VIII.

LIME also requests that the following Determinations be stayed during the period of reconsideration by the Authority:

- the Determinations to release confidential information in the 2G and 3G FLLRIC modules, as set out on pages 5 and 6 of the Authority's 14 January 2010 letter;
- the Determination to disclose confidential information in Appendix V, as set out on page 10 of the Authority's 14 January 2010 letter; and
- the Determination to disclose confidential information in Appendix VIII, as set out on pages 9 and 10 of the Authority's 14 January 2010 letter.

Compliance with those Determinations prior to their reconsideration by the Authority would render this application moot, as the information, once disclosed, cannot be recalled.

Please do not hesitate to contact the undersigned if you should have any questions.

Sincerely yours,

Cable and Wireless (Cayman Islands) Ltd. d.b.a. LIME

'Signed'

Frans Vandendries
VP , Legal Regulatory and Corporate Affairs (Central)

c.c. Anthony Ritch, Country Manager, LIME
Donald Austin, EVP Legal Regulatory and Corporate Affairs, LIME
Camille Facey, VP Legal Regulatory and Corporate Affairs (Jamaica & OFC), LIME
Pete Smith, Regulatory Finance Advisor, LIME
Interested Parties in CD (2009-1)/(2008-2)